STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 23, 2004
v JAWAN CHARLES HAYES, Defendant-Appellant.	No. 246012 Wayne Circuit Court LC No. 02-005914-02

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v DATHAN PRICE, Defendant-Appellant.	No. 246013 Wayne Circuit Court LC No. 02-005914-03

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v KATHERINE WRIGHT, Defendant-Appellant.	No. 246822 Wayne Circuit Court LC No. 02-005914-01

Before: Murphy, P.J., and O'Connell and Gage, JJ.

PER CURIAM.

Defendants Jawan Hayes, Dathan Price, and Katherine Wright were tried jointly, defendants Hayes and Wright before one jury, and defendant Price before a separate jury. Hayes was convicted of first-degree premeditated murder and first-degree felony murder, MCL

750.316(1)(a) and (b), armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b(1). Price was convicted of first-degree felony murder, armed robbery, and felony-firearm. Wright was convicted of first-degree premeditated murder and first-degree felony murder, and armed robbery. All three defendants were sentenced to life imprisonment without the possibility of parole for each murder conviction, but the trial court subsequently vacated the felony murder sentences for defendants Hayes and Wright. The court additionally sentenced defendants Hayes and Price to concurrent prison terms of fifteen to twenty-five years each for the armed robbery convictions, and a consecutive two-year term for each of the felony-firearm convictions. Defendant Wright was sentenced to an additional concurrent term of ten to twenty years' imprisonment for her armed robbery conviction. Defendant Hayes now appeals as of right in Docket No. 246012, defendant Price appeals as of right in Docket No. 246013, and defendant Wright appeals as of right in Docket No. 246822. We affirm defendants' convictions, but remand for modification of the judgments of sentence.

Defendants Hayes and Wright argue that the trial court erred in allowing the prosecutor to introduce as substantive evidence against them testimony from a jailhouse informant concerning statements made to the informant by defendant Price. Defendants argue that the statements were inadmissible hearsay and violated their constitutional rights of confrontation. We disagree.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 549-550; 581 NW2d 654 (1998). Preliminary issues of admissibility involving questions of law, e.g., whether a rule of evidence precludes admission, are reviewed de novo, but it is an abuse of discretion to admit evidence that is inadmissible as a matter of law. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A reviewing court may not substitute its judgment for the trial court's on close questions arising from the trial court's exercise of discretion on an evidentiary issue; ordinarily there is no abuse of discretion where the evidentiary question is a close one. *Smith*, *supra* at 550. Constitutional questions are reviewed de novo. *In re Hawley*, 238 Mich App 509, 511; 606 NW2d 50 (1999).

In *Crawford v Washington*, 541 US ___; 124 S Ct 1354, 1369-1370, 1374; 158 L Ed 2d 177 (2004), the United States Supreme Court explicitly overruled *Ohio v Roberts*, 448 US 56; 100 S Ct 2531; 65 L Ed 2d 597 (1980), and held that *testimonial* out-of-court statements may not be admitted against a criminal defendant unless the declarant is unavailable *and* there has been a prior opportunity for cross-examination. Whether a statement is testimonial is the "trigger" of the Confrontation Clause analysis. *Crawford*, *supra*, 124 S Ct at 1372; see also *People v McPherson*, ___ Mich App ___; ___ NW2d ___ (Docket No. 242767, issued 7/20/04), slip op at 4-5. By contrast, "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framer's design to afford the States flexibility in their development of hearsay law . . . ." *Crawford*, *supra*, 124 S Ct at 1374.

In the present case, defendant Price made statements to a fellow inmate, Daniel Bizovi. There is no indication that Bizovi was acting as a government agent. Therefore, we conclude that defendant Price's statements to Bizovi were not testimonial in nature and, thus, are not governed by *Crawford*. See *People v Geno*, 261 Mich App 624, 630-631; 683 NW2d 687 (2004).

MRE 804(b)(3) provides that the following type of statement is not excluded by the hearsay rule, MRE 802, if the declarant is unavailable as a witness:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

In *People v Poole*, 444 Mich 151, 161; 506 NW2d 505 (1993), our Supreme Court squarely rejected the defendants' argument that only those portions of a statement directly implicating the declarant, i.e., defendant Price here, should be admitted. Rather, "where . . . the declarant's inculpation of an accomplice is made in the context of a narrative of events, at the declarant's initiative, without any prompting or inquiry, that as a whole is clearly against the declarant's penal interest and as such is reliable, the whole statement—including portions that inculpate another—is admissible as substantive evidence at trial under MRE 804(b)(3)." *Id.* Additionally, such a statement is not barred by the Confrontation Clause where the totality of circumstances indicate that the statement contains indicia of reliability sufficient to establish particularized guarantees of trustworthiness. *Id.* at 164-165.

In the present case, defendant Price's statements to Bizovi were made voluntarily, shortly after the events referenced. Bizovi may be characterized as a confederate and, because defendant Price was seeking "legal" advice concerning this case, he was someone to whom defendant Price would likely speak the truth. In this context, defendant Price did not have a motive to lie. Bizovi did not prompt defendant Price or inquire concerning the events. Although defendant Price tended to somewhat minimize his role in the events and shift blame to defendants Hayes and Wright, he admitted participating in the offense and firing the first shot. Lastly, there is no indication that he made the statements to avenge himself or curry favor. Upon considering defendant Price's statements in light of the factors in *Poole*, *supra* at 165, the trial court did not abuse its discretion in finding that the statements contained adequate indicia of trustworthiness to be admitted as substantive evidence against defendants Wright and Hayes.

Next, defendants Hayes and Price argue that the trial court erred in allowing the prosecutor to have a witness, Carnell Hayes, read his own statement into the record. We disagree.

The statement was allowed under the recorded recollection exception to the hearsay rule, MRE 803(5), which provides:

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

To be admissible under MRE 803(5), a proper foundation must be laid concerning the time and place of the statement and the person to whom it was allegedly made. See *People v Rodriguez*,

251 Mich App 10, 34; 650 NW2d 96 (2002). "'(1) The document must pertain to matters about that the declarant once had knowledge; (2) [t]he declarant must now have an insufficient recollection as to such matters; [and] (3) [t]he document must be shown to have been made by the declarant or, if made by one other than the declarant, to have been examined by the declarant and shown to accurately reflect the declarant's knowledge when the matter [wa]s fresh in his memory.'" *People v Hoffman*, 205 Mich App 1, 16; 518 NW2d 817 (1994), quoting *People v Daniels*, 192 Mich App 658, 667-668; 482 NW2d 176 (1992).

In this case, although we agree a foundation for admitting Carnell Hayes' statement was initially lacking, it became clear after Hayes read his statement that he was unable to remember, or feigned not being able to remember, anything substantive about the night in question. Thus, although the statement may have been received prematurely, a sufficient foundation for receiving it under MRE 803(5) was ultimately established. Therefore, the trial court did not abuse its discretion in allowing the prosecutor to use the statement as substantive evidence by having it read to the jury.

Next, defendant Hayes argues that the trial court violated his right of confrontation by allowing the prosecutor to use defendant Wright's second statement to the police as substantive evidence against him. Because defendant Hayes did not object to the admission of defendant Wright's statement, we review this unpreserved issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999). Even if this test is met, reversal is unwarranted unless a miscarriage of justice would result because the defendant is actually innocent or the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 763.

Defendant Hayes additionally argues that his attorney was ineffective for failing to object to defendant Wright's statement. Because defendant Hayes did not raise this issue in a motion for a *Ginther*[1] hearing or a new trial, our review of this claim is limited to mistakes apparent from the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). Whether a defendant has been denied effective assistance of counsel is a mixed question of fact and constitutional law, with questions of constitutional law being reviewed de novo and factual findings being reviewed for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel

[1] *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).

> was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

It is apparent that defendant Wright's statement was admitted for its truth. Compare *McPherson*, *supra*, slip op at 5-6. We agree that defendant Wright's police statement was inadmissible as substantive evidence against defendant Hayes, given that the statement was testimonial in nature and that defendant Wright did not testify at trial. *Crawford*, *supra*; *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968). The use of this evidence violated defendant Hayes' right of confrontation and constitutes plain error.

Nonetheless, we conclude that the error did not affect defendant Hayes' substantial rights. There was other solid evidence against defendant Hayes, including the presence of his car at the crime scene, the fabricated claim that it was stolen, the testimony of Wallace and Paris Richards, Carnell Hayes' statement, the shotgun found at defendant Hayes' home, defendant Hayes' own statements to the police, and Bizovi's testimony. Considered in the context of this other evidence, the plain error arising from the admission of defendant Wright's statement was not decisive of the outcome. We cannot conclude that reversal is warranted on the basis that defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

Concerning defense counsel's failure to object, we note that at the time of trial, our Supreme Court's decision in *People v Washington*, 468 Mich 667, 671-673; 664 NW2d 203 (2003), provided a basis for admitting defendant Wright's statement as substantive evidence against defendant Hayes under MRE 804(b)(3). In this circumstance, we cannot conclude that defense counsel was ineffective for failing to object to the testimony. See *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000). Additionally, in light of the other overwhelming evidence of defendant Hayes' guilt, there is no reasonable probability that the result of the trial would have been different had the evidence not been received against defendant Hayes.

Defendants Hayes and Price also argue that the prosecutor failed to provide reasonable assistance in locating res gestae witness Quatella Williams, and that their attorneys were ineffective in failing to request a missing witness instruction.[2] We disagree.

[2] While defendant Price did not object, we conclude that the issue was preserved by co-counsel's objection. See *People v Logie*, 321 Mich 303, 307; 32 NW2d 458 (1948); see also *People v Herman Brown*, 38 Mich App 69, 75; 195 NW2d 806 (1972).

Since 1986, the prosecutor's duty to produce res gestae witnesses has been replaced with "'an obligation to provide notice of known witnesses and reasonable assistance to locate witnesses on defendant's request.'" *People v Perez*, 469 Mich 415, 418-419; 670 NW2d 655 (2003), quoting *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995). Nevertheless, the missing witness instruction may still be given in certain situations. *Perez*, *supra* at 416, 420-421. Among others, "if a prosecutor falls short of providing [reasonable assistance, including investigative] assistance, it might be appropriate to instruct the jury that the missing witness would have been unfavorable to the prosecution." *Id.* at 420. However, "in every instance, the propriety of reading CJI2d 5.12[3] will depend on the specific facts of that case." *Id.*at 420-421.

In the present case, although defense counsel objected to the prosecutor's failure to produce Quatella Williams, he never asked the court to conduct a due diligence hearing, and never asked for *the prosecutor's* assistance in locating the witness. Nor did counsel request a missing witness instruction. An attorney's decision to request a particular jury instruction is generally presumed to be a matter of trial strategy. *People v Gonzalez*, 468 Mich 636, 645; 664 NW2d 159 (2003).

On the specific facts of this case, which included an attempt by the prosecutor to serve Williams with a subpoena two weeks before trial and an effort by the prosecutor to discover Williams' whereabouts and obtain contact information through relatives during trial, reading the jury CJI2d 5.12 would not have been appropriate. *Perez, supra* at 420-421, citing MCL 767.40a. Further, there is no indication that Williams' testimony would have been unfavorable to the prosecution. Although defendant Hayes asserts that Williams' description of the perpetrators did not match him, the descriptions did comport with codefendants Price and Wright. Defendants Hayes and Price have failed to establish ineffective assistance of counsel. Additionally, in light of the weight and strength of the evidence presented at trial, particularly Bizovi's testimony, defendants have not shown that it is more probable than not that a different outcome would have resulted without the alleged error. *Lukity, supra* at 495, 497.

Next, defendant Hayes argues that his dual convictions of both first-degree premeditated murder and first-degree felony murder violate his double jeopardy protections. Defendant Hayes and defendant Price also both argue that each conviction for armed robbery must be vacated because it served as the predicate felony for each felony murder conviction. We agree. Whether double jeopardy applies is a question of law that we review de novo. *People v White*, 212 Mich App 298, 304-305; 536 NW2d 876 (1995).

It is a violation of double jeopardy to convict a defendant of both first-degree felony murder and first-degree premeditated murder arising from a single death. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Therefore, defendant Hayes' judgment of sentence should be modified to specify a single first-degree murder conviction supported by two theories, i.e., premeditated murder and felony murder. *Id.* Similarly, it is a violation of double jeopardy

[3] The jury instruction states, "_____ is a missing witness whose appearance was the responsibility of the prosecution. You may infer that this witness's testimony would have been unfavorable to the prosecution's case." See *Perez, supra* at 416 n 1.

to convict a defendant of both felony murder and the underlying felony. *People v Harding*, 443 Mich 693, 714; 506 NW2d 482 (1993); *People v Coomer*, 245 Mich App 206, 224-225; 627 NW2d 612 (2001). Therefore, defendant Hayes' and defendant Price's armed robbery convictions must be vacated. *Id.* Although defendant Wright does not raise this double jeopardy issue, in order to avoid inconsistent results in these consolidated appeals, we direct that her judgment of sentence be similarly modified. *People v Cedric Hayden*, 132 Mich App 273, 288-289 n 8; 348 NW2d 672 (1984).

Defendant Price argues that he was arrested without probable cause and, therefore, the trial court erred in denying his motion to suppress his statements to the police. We disagree.

A trial court's ruling regarding a motion to suppress evidence is ordinarily reviewed for clear error. *People v Hamilton*, 465 Mich 526, 529; 638 NW2d 92 (2002). But when the ruling turns not on factual determinations, but on a question of law, it is reviewed de novo. *Id.*

An arresting officer must possess information demonstrating probable cause to believe that an offense has occurred and that the defendant committed it. *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996), citing MCL 764.15. "Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Champion, supra* at 115 (citation omitted). "In reviewing a challenged finding of probable cause, an appellate court must determine whether the facts available to the arresting officer at the moment of arrest would justify a fair-minded person of average intelligence in believing that the suspected individual had committed the felony." *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 480 (1998)(citations omitted).

Here, the record discloses that the evidence available to the police at the time of defendant Price's arrest was sufficient to "justify a fair-minded person of average intelligence in believing" that he was involved in the killing and robbery at issue. *Id.* The police arrested defendant Price after obtaining information from defendant Hayes. Although defendant Hayes was not fully trustworthy, his cousin had confirmed "Cash's" involvement and physical description, which matched defendant Price. Further, after defendant Price was arrested, but before he gave a statement, defendant Hayes confirmed that defendant Price was "Cash." The trial court did not clearly err in refusing to suppress defendant Price's resulting statements.

Defendant Price argues that the trial court abused its discretion by allowing the prosecutor to introduce prejudicial evidence that the victim intended to divorce defendant Wright and change the beneficiary of his life insurance policy, and that, on the day after the victim's death, defendant Wright went through the victim's apartment looking for valuables and attempted to collect on his life insurance policy. Defendant Price argues that evidence of motive was not relevant to his case, because he was charged only with first-degree felony murder. Defendant Wright similarly argues that the testimony concerning the victim's intent was based on inadmissible hearsay, was not relevant to determining her intent, and that the trial court erred in failing to so caution the jury.

We find that the evidence was properly admitted. With respect to defendant Wright, she was charged with first-degree premeditated murder. Premeditation may be inferred from all the

facts and circumstances of a killing, including the relationship between the parties, the circumstances of the killing itself, and the defendant's conduct before and after the killing. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995); *People v Furman*, 158 Mich App 302, 308; 404 NW2d 246 (1987). Here, the disputed evidence was relevant to the issue of defendant Wright's motive and intent. Additionally, the evidence of the victim's intent to divorce defendant Wright and change the beneficiary designations on his life insurance policies was admissible under MRE 803(3), which provides that "[a] statement of the declarant's then existing state of mind, emotion . . . (such as intent, plan, [or] motive . . .)" is not excluded by the hearsay rule. The evidence of defendant Wright's actions on the day after the offense were similarly relevant to the issues of intent, premeditation, and credibility. We also conclude that there was no Confrontation Clause violation under *Crawford* and *Poole*, *supra.* The trial court did not abuse its discretion in allowing defendant Wright's jury to hear this evidence. See *People v Ortiz*, 249 Mich App 297, 307-310; 642 NW2d 417 (2002).

Defendant Price was only charged with first-degree felony murder, along with armed robbery and felony-firearm. There was no question of premeditation. Further, there was no evidence that defendant Price knew the victim or his plans to either divorce defendant Wright or change his life insurance beneficiary designations. However, informant Bizovi testified that defendant Price informed him that he was going to be paid approximately $500 "out of some insurance money" for assisting defendant Hayes and that defendant Hayes would be paid, in part, out of insurance proceeds. Because defendant Price's method of payment concerned insurance proceeds, it was arguably relevant for the jury to hear testimony regarding the underlying insurance policy and matters affecting the policy. Even with felony murder, malice must be shown, which can be established, in part, through evidence that the defendant either had an intent to kill or to inflict great bodily harm. *People v Aaron*, 409 Mich 672, 733; 299 NW2d 304 (1980). Accordingly, the jury certainly would have been interested in defendant Price's motive to do harm to the victim, and considering the testimony of Bizovi indicating that defendant Price knew that he would be paid for his actions out of insurance money, evidence touching on insurance would be relevant. Further, the probative value of the evidence was not "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[.]" MRE 403. Under these circumstances, we cannot conclude that the trial court abused its discretion in allowing defendant Price's jury to hear this evidence. Moreover, considering the weight and strength of the untainted evidence against defendant Price, particularly Bizovi's testimony, defendant Price has not shown that it is more probable than not that a different outcome would have resulted even assuming error. *Lukity*, *supra* at 495, 497.

Next, defendants Price and Wright both argue that the prosecutor committed misconduct that deprived them of a fair trial. We disagree.

Claims of prosecutorial misconduct are reviewed on a case by case basis, and the challenged remarks are reviewed in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267 and nn 5-7; 531 NW2d 659 (1995). However, where a defendant fails to object to alleged misconduct, the defendant must show a plain error affecting his or her substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000); see also *Carines, supra* at 763-764. "[A]ppellate review is precluded

unless a curative instruction could not have eliminated possible prejudice or failure to consider the issue would result in a miscarriage of justice." *Noble*, *supra* at 660.

It is improper for a prosecutor to inject issues broader than a defendant's guilt or innocence. *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). Here, while the prosecutor's remark inquiring of defendant Price whether he found Bizovi's testimony to be funny was intemperate, any prejudice stemming from this isolated remark was cured when the trial court sustained defense counsel's objection to the remark. *People v Griffin*, 235 Mich App 27, 45; 597 NW2d 176 (1999). Further, we cannot perceive of any prejudice to defendant Wright arising from the remark, given that it was not directed at her. Also, the juries were instructed that the comments and questions of counsel were not evidence. For these reasons, defendants Price and Wright have failed to show that the remark deprived them of a fair trial.

To the extent the prosecutor intentionally mispronounced the word "alibi" as "a lie by" during her questioning of defendant Hayes' sister, the comment did not deprive defendants Price and Wright of a fair trial considering that the trial court sustained counsel's objection to the remark, that the remark was directed at defendant Hayes' alibi, and that neither defendant Price nor defendant Wright presented an alibi defense.

Similarly, the prosecutor's reference to "a lie by" during rebuttal closing argument does not require reversal. During closing argument, a prosecutor is free to attack the witnesses' credibility in light of the evidence. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). She may use emotional language. *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003). In this case, the prosecutor was responding to defendant Hayes' reference to his alibi. In this context, the rebuttal remark was not improper. Further, to the extent the remark could be deemed improper, any resulting prejudice could have been cured by a timely instruction upon request. Additionally, the remark was not directed at defendant Wright, and defendant Price's separate jury was not present when the remark was made. Accordingly, there is no basis for concluding that defendant Wright's or defendant Price's substantial rights were affected with respect to this unpreserved issue.

It was improper for the prosecutor to refer to the unrelated death of a police officer, because a prosecutor may not inject issues broader that the defendant's guilt or innocence. *Rice*, *supra* at 438. Nor may a prosecutor appeal to the sympathies, emotions, fears or prejudices of the jurors. *Bahoda*, *supra* at 282; *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). Here, however, the error was cured when the trial court immediately sustained defense counsel's objection to the reference. Additionally, the juries were instructed not to let sympathy or prejudice influence their decision. Defendants Wright and Price have failed to show that they were deprived of a fair trial.

For the same reasons, the prosecutor's comments referring to the attack on the World Trade Center[4] and mentioning that the victim's children had been left without a father do not

[4] This remark was only made to the Hayes/Wright jury and, therefore, could not have prejudiced defendant Price.

warrant reversal. *Bahoda*, *supra* at 282; *Watson*, *supra* at 591. Any resulting prejudice could have been cured by a timely instruction upon request. Additionally, the juries were instructed not to let sympathy or prejudice influence their decision. Thus, defendants Wright and Price have failed to show a plain error affecting their substantial rights with respect to this unpreserved issue.

Defendants Price and Wright also argue that the trial court improperly instructed the jury concerning the intent necessary to convict them of felony murder, thereby lessening the prosecutor's burden of proof under *Aaron*, *supra*. Counsel for defendant Wright expressed satisfaction with the instructions given. Counsel for defendant Price similarly expressed satisfaction, except for the court's refusal to give certain instructions not at issue here. Therefore, any instructional error was waived. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000); *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Further, even if we considered this instructional issue under the plain error test applicable to unpreserved issues, *Carines*, *supra* at 763, reversal would not be warranted. The record discloses that the trial court clearly instructed the juries that, in order to convict each defendants of felony murder, they had to find that the defendant acted with malice, and that it was not sufficient to find that they acted with the intent necessary to commit the underlying offense. *Aaron*, *supra* at 728-729. The instructions did not constitute plain error affecting defendants' substantial rights.

Defendant Wright argues that the trial court erred in denying her request for newly retained counsel, court-appointed counsel, or to represent herself. We disagree.

A trial court's decision affecting a defendant's right to counsel of her choice, whether to appoint substitute counsel for a defendant, and whether to allow a defendant to represent herself at trial are all reviewed for an abuse of discretion. *People v Akins*, 259 Mich App 545, 556-557; 675 NW2d 863 (2003); *People v Hicks*, 259 Mich App 518, 521-522; 675 NW2d 599 (2003); *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

Although a criminal defendant has a right to retain counsel of her choice, that right is not absolute. *Akins*, *supra* at 557. In determining whether a defendant's right to counsel of her choice has been violated, the court is to balance the right against the public's interest in the prompt and efficient administration of justice. *Id.* In reviewing a trial court's denial of a continuance to obtain new counsel, the following factors are considered:

> "(1) whether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was negligent in asserting his right, (4) whether the defendant is attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision." [*Id.* at 557, quoting *People v Echavarria*, 233 Mich App 356, 369; 592 NW2d 737 (1999).]

In this case, although defendant Wright's right to counsel of her choice is constitutionally-based, she did not establish a legitimate basis for seeking to replace her retained attorney. Further, defendant Wright was negligent in waiting until the day of trial to seek to replace her attorney. Granting the request would have necessitated a delay of the trial. Given the equivocal nature of defendant Wright's request, for either appointed counsel, newly retained

counsel, or self-representation, the public's interest in the prompt administration of justice properly prevailed.

As with retained counsel, the appointment of substitute counsel is warranted only upon a showing of good cause, if substitution will not unreasonably disrupt the judicial process. *Traylor*, *supra* at 462. Here, replacing retained counsel with appointed counsel on the day of trial would have necessitated a delay of defendant Wright's trial in these consolidated cases and disrupted the judicial process. The court did not abuse its discretion in requiring defendant Wright to proceed with her retained attorney. Lastly, defendant Wright's assertion of the right to represent herself was not "unequivocal," but rather a reflection of her unhappiness with her retained attorney. Therefore, the trial court did not err in denying the request. *People v Dennany*, 445 Mich 412, 432, 439; 519 NW2d 128 (1994).

Next, defendant Wright argues that the trial court erred in denying her motion to be tried by a separate jury. The record discloses that defendant Wright took no position concerning defendant Price's motion to be tried by a separate jury, which the trial court granted. When the prosecutor filed a motion to try defendants Wright and Hayes before a single jury, defendant Wright's attorney expressed uncertainty because he did not know whether defendant Hayes was going to testify, and whether he would tend to shift the blame to defendant Wright. Counsel stated that, if defendant Hayes presented only an alibi defense through other witnesses, and did not testify, he would have no problem with a joint jury. He concluded that, because he did not know what defendant Hayes and his attorney were going to do, "at this point in time *I obviously have a problem* with going to trial with [defendant] Hayes."

Despite counsel's attempt to hedge his position, we conclude that because defendant Hayes in fact pursued only an alibi defense and did not testify, and because counsel for defendant Wright expressed that he did not have a problem with a joint trial in this situation, any error has been waived. *Carter*, *supra* at 215.

Even if the issue was not waived, we note that severance is mandated under MCR 6.121(C) only when a defendant clearly and affirmatively demonstrates through an affidavit or offer of proof that his substantial rights will be prejudiced by a joint trial and that severance is the necessary means of rectifying the potential prejudice. *People v Hana*, 447 Mich 325, 331, 346; 524 NW2d 682 (1994). The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision. *Id.* at 346-347. Because defendant Wright's attorney did not clearly or affirmatively demonstrate that defendant Wright would be prejudiced by a joint trial, and because our review of the record fails to disclose actual prejudice at trial, reversal is not warranted.

Defendant Wright next argues that there was insufficient evidence to convict her of armed robbery and murder.[5] We disagree.

[5] Defendant Wright does not indicate whether she is challenging her first-degree premeditated murder conviction, the first-degree felony murder conviction, or both.

The sufficiency of the evidence is to be evaluated by reviewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find every element of the crime charged proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). The resolution of credibility disputes is within the exclusive province of the trier of fact. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). The trier of fact may draw reasonable inferences from the evidence. *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991). Contrary to what defendant Wright asserts, our Supreme Court has abrogated the rule that an inference cannot be built upon an inference to establish an element of the offense. *People v Hardiman*, 466 Mich 417, 424, 428; 646 NW2d 158 (2002), overruling *People v Atley*, 392 Mich 298; 220 NW2d 465 (1974), and its progeny.

Testimony indicated that defendant Wright told Paris and Wallace Richards that she wanted to hire someone to beat the victim and do an insurance job on her car, and that she was referred to defendant Hayes, who volunteered to do it. Defendant Wright admitted to the police that she asked the victim to come to her house on the night he was killed there. Although defendant Wright argues that the evidence did not support a finding that she intended to have the victim killed, testimony indicated that the victim was planning to file for divorce from defendant Wright and remove her as a beneficiary under his life insurance policy. Additionally, Bizovi testified that, according to defendant Price, defendant Wright orchestrated the entire incident and instructed defendant Hayes to make it look like an armed robbery and a beating. Defendant Wright was going to pay defendant Hayes $5,000 out of her insurance money. Bizovi also testified that defendant Price told him that defendant Wright was very happy when the victim was shot. Witnesses also testified that defendant Wright attempted to collect the insurance policy benefits on the morning after the victim's death. She also took valuables from his apartment and did not seem sad or distraught. Viewed most favorably to the prosecution, this evidence supports an inference that defendant Wright intended for the victim to be killed, so she could collect the proceeds of the victim's insurance policy before he changed the beneficiary designation. The evidence was sufficient to support each of defendant Wright's convictions beyond a reasonable doubt.

Lastly, each defendant argues that the cumulative effect of the several errors committed below deprived them of a fair trial. We disagree. Although one error in a case may not necessarily provide a basis for reversal, it is possible that the cumulative effect of a number of errors may add up to error requiring reversal if the defendant was denied his right to a fair trial. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). In this case, we have rejected most of the defendants' claims of error. Although some errors occurred, their cumulative effect did not deny defendants a fair trial.

Affirmed in part and remanded for modification of the judgments of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Hilda R. Gage